

December 31, 1991

Mr. Gary L. Smith
Executive Director
Protection and Advocacy Agency of Hawaii
1580 Makaloa Street, Suite 1060
Honolulu, Hawaii 96814

Dear Mr. Smith:

Re:Public Access to Ambulance Report Form Concerning a
Deceased Individual

This is in reply to a letter from Manuel Aoanan, formerly a staff attorney with the Protection and Advocacy Agency of Hawaii ("P&A"), requesting an advisory opinion from the Office of Information Practices ("OIP") concerning the above-referenced matter.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), an Ambulance Report Form maintained by the City and County of Honolulu's Department of Health, Emergency Ambulance Service Division, concerning a deceased individual must be made available for public inspection and copying.

BRIEF ANSWER

Under the UIPA, an agency is not required to disclose "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. . 92F-13(1) (Supp. 1991). Although the UIPA provides that individuals have a significant privacy interest in information concerning their medical history, diagnosis, condition, or

treatment, in two previous OIP advisory opinions we concluded that under most circumstances, an individual's death extinguishes the individual's privacy interest in a government record. Because the P&A seeks access to an Ambulance Report Form containing medical information concerning a deceased individual, we conclude that the disclosure of the City's Ambulance Report Form in this case would not constitute a clearly unwarranted invasion of personal privacy under the UIPA.

FACTS

Pursuant to Executive Order No. 89-2 (1989), the Governor of the State of Hawaii designated P&A as the State's protection and advocacy system under the Protection and Advocacy for Mentally Ill Individuals Act of 1988, 42 U.S.C. . 10801 (Supp. 1990) ("PAMI"). As a condition of the receipt of federal funding under the PAMI, each state must designate a protection and advocacy system that is independent of any agency which provides treatment of mentally ill individuals. Furthermore, the system established by each state under the PAMI must be authorized to pursue legal, administrative, and other appropriate remedies to ensure the rights of the mentally ill. The PAMI also charges each state's protection and advocacy system with the obligation to investigate incidents of abuse or neglect involving mentally ill individuals.

On March 22, 1989, a mentally ill patient at the Hawaii State Hospital died. According to the P&A, this patient's death certificate listed the cause of death as possible cardiac arrest. According to an investigation by the P&A, personnel from the City and County of Honolulu Department of Health, Emergency Ambulance Service Division ("City"), responded to this incident. Further, the P&A's investigation apparently revealed that the patient died while under the care of City ambulance personnel.

As part of its investigation into the death of this former patient at Hawaii State Hospital, the P&A requested a copy of the City's Ambulance Report Form concerning this individual. A blank copy of the City's Ambulance Report Form is attached as Exhibit "A." On the advice of the Department of the Corporation Counsel, the City has refused to make this individual's Ambulance Report Form available for inspection and copying by P&A personnel.

The P&A requests an advisory opinion from the OIP concerning whether the City's Ambulance Report Form must be made available for public inspection and copying and, if not, whether

provisions of the PAMI grants it special access to this government record. For the reasons stated below, we need only resolve the first question presented to the OIP.

DISCUSSION

The UIPA generally provides:

. 92F-11 Affirmative agency disclosure responsibilities.

.

(b) Except as provided by section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours. . . .

Haw. Rev. Stat. . 92F-11(b) (Supp. 1991).

Thus, we must determine whether one or more of the statutory exceptions to required agency disclosure applies to an Ambulance Report Form concerning a deceased individual who was treated by City ambulance service personnel. In examining the UIPA's exceptions to public access set forth at section 92F-13, Hawaii Revised Statutes, and based upon the facts presented, the only exception that would potentially apply to the government record at issue is that which does not require an agency to disclose "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. . 92F-13(1) (Supp. 1991).

As an initial matter, the UIPA's personal privacy exception only applies to government records in which an individual has a "significant" privacy interest. See S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H.R. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988) ("[o]nce a significant privacy interest is found, the privacy interest will be balanced"). In section 92F-14(b), Hawaii Revised Statutes, the Legislature set forth examples of information in which an individual has a significant privacy interest under the UIPA. This section provides in pertinent part:

(b) The following are examples of information in which the individual has a significant privacy interest:

- (1) Information relating to medical, psychiatric, or psychological history, diagnosis, condition, treatment, or evaluation

Haw. Rev. Stat. . 92F-14(b)(1) (Supp. 1991) (emphases added).

Thus, it is clear that under the UIPA, individuals have a significant privacy interest in information concerning their medical history, diagnosis, condition, or treatment. A review of the sample Ambulance Report Form attached as Exhibit "A" reveals that when completed, it may contain substantial medical information concerning an individual who is treated by the City's emergency ambulance service.

However, in OIP Opinion Letter Nos. 90-18 (May 18, 1990) and 90-26 (July 19, 1990), relying upon case law under the federal Freedom of Information Act's personal privacy exemption,¹ we observed that the majority rule is that an individual's death extinguishes the individual's privacy interest in a government record:

The UIPA does not specifically state whether an individual has a significant privacy interest once the individual is deceased. . . . Under FOIA case law, the majority rule is that death extinguishes an individual's privacy rights. Office of Information and Privacy, U.S. Dep't. of Justice, Freedom of Information Case List 433 (1989) ("FOIA Case List"); e.g., Diamond v. FBI, 707 F.2d 75, 77 (2d Cir. 1983); Rabbit v. Dep't. of the Air Force, 383 F. Supp. 1065, 1070 (S.D.N.Y. 1974), on motion for reconsideration, aff'd and rev'd on other grounds, 401 F. Supp. 1206, 1210

OIP Op. Ltr. No. 90-18 at 9.

Moreover, in OIP Opinion Letter No. 91-32 (Dec. 31, 1991), the OIP re-examined whether, under the UIPA, deceased individuals

¹5 U.S.C. . 552(b)(6) (1988) provides that federal agencies need not make available for public inspection "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

have a privacy interest in government records, in determining whether county autopsy reports must be made available for public inspection and copying under the UIPA. After examining court decisions in other jurisdictions handed down after the issuance of OIP Opinion Letter Nos. 90-19 and 90-26, the OIP again found that the right to privacy is a personal right that ends with the death of an individual. Accordingly, in OIP Opinion Letter No. 91-32, we concluded that a government record concerning a deceased individual may not be withheld by an agency under the UIPA's privacy exception unless the record refers to another individual, and its disclosure would be a clearly unwarranted invasion of such other individual's privacy.

Assuming that the subject Ambulance Report Form does not contain references to persons other than the deceased former resident of the Hawaii State Hospital, we conclude that the disclosure of the Ambulance Report Form would not constitute a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised Statutes.

Further, because we generally conclude that "any person" may inspect and copy the Ambulance Report Form concerning this deceased individual, it is not necessary for the OIP to express an opinion concerning whether specific provisions of federal law expressly authorize the P&A to have access to this government record,² or concerning whether the P&A is an "agency" and, therefore, entitled to the report under the inter-agency disclosure provisions of section 92F-19(a), Hawaii Revised Statutes.

CONCLUSION

We conclude that under the UIPA, the public, including the P&A, must be permitted to inspect the Ambulance Report Form concerning an individual who, before the individual's death, was a patient at the State of Hawaii Hospital. Because this individual is now deceased, any privacy interest that this

²Under the provisions of the PAMI, the P&A must be authorized to have access to the records and reports of a "a facility rendering care and treatment" or "reports prepared by an agency charged with investigating reports of incidents of abuse, neglect, and injury occurring at such facility." See 42 U.S.C. .10806(b) (3) (A) (Supp. 1990).

Mr. Gary L. Smith
December 31, 1991
Page 6

individual had in the subject Ambulance Report Form has been extinguished. Accordingly, the disclosure of this individual's Ambulance Report Form would not constitute a clearly unwarranted invasion of personal privacy under the UIPA, unless the report form refers to another individual and disclosure of the report would constitute a clearly unwarranted invasion of such individual's personal privacy.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

HRJ:sc
Attach.

c: Honorable Ronald Munn
Corporation Counsel,
City and County of Honolulu